Yamamori (Hong Kong) Ltd v Davidson & Ors

HIGH COURT (MIRI) — SUIT NO K524 OF 1988
IAN HC CHIN JC
4 AUGUST 1992

Civil Procedure *— Parties — Joinder — Application to add defendant — Whether intended defendant a necessary party — Principles applicable — Allegation of inordinate delay — Rules of the High Court 1980 O 15 r 6(2)(b)*

Civil Procedure *— Election — Estoppel — Parties — Joinder — Preliminary objection by plaintiff at trial that defences pleaded by defendants not available to them — Court ruling that trial be adjourned to enable application to be made for adding a defendant — Existing defendants appealing against order — Application made by intending defendant for joinder — Whether defendants had made election on behalf of intending defendant not to apply for joinder — Whether estoppel applied*

Civil Procedure *— Judgments and orders — Plaintiff applying for judgment on ground that preliminary objections upheld — Court ordering adjournment of trial to enable defendant to be added following ruling on objections — Defendants appealing against ruling on objections — Whether plaintiffs entitled to judgment*

Civil Procedure *— Affidavit — Source of information and grounds of belief not stated by deponent — Statements of fact deposed to already set out in judgment of court in earlier proceedings — Whether affidavit defective*

Civil Procedure *— Affidavit — Contentions and submissions in affidavit — No allegation of fact — No affidavit in reply — Whether an admission by default*

The plaintiff commenced on 21 October 1988 the present action for certain declarations, injunctions and damages against the defendants following the appointment of a receiver of a company called Hiew Fook Realty (Holdings) Sdn Bhd by a bank pursuant to a debenture granted to it by that company. The receiver took various steps which resulted eventually in Borneo Hotel Sdn Bhd ('the company'), which was a subsidiary of Hiew Fook Realty (Holdings) Sdn Bhd, resolving at an extraordinary general meeting to sell the Borneo Hotel which was an asset of the company. Amongst the relief sought in the present action were a declaration that the meeting of the company was invalid, null and void, and of no effect and an injunction to restrain the sale of the Borneo Hotel.

When the trial commenced, counsel for the plaintiff raised various preliminary objections, saying that HFR Plantations Sdn Bhd ('HFRP') ought to have been added as a party. The plaintiff had sought in the action to establish themselves as the owners of the shares in the company. The issue that arose was as to whether it was the plaintiff or HFRP who were the owners of the shares.

The court upheld the objections and ordered an adjournment of the trial to enable an application to be made for HFRP to be added as a defendant to the action. Within four days after the court had made

the order, HFRP applied for an order to be joined as a defendant to the action. The application was opposed by the plaintiff. The plaintiff also took out a summons-in-chambers for judgment to be entered against the defendants.

It was also contended for the plaintiff that certain affidavit evidence tendered by the defendants was not admissible because the source of the information and the grounds of belief of the deponent were not stated. Apparently, the deponent had stated what he believed on the basis of what had been told to him by counsel for the defendants. The facts deposed to in the affidavit and objected to by counsel for the plaintiff were fully set out in a judgment of the court in the earlier proceedings in the action.

It was also contended for the plaintiff that there had been delay on the part of HFRP and that HFRP were estopped from intervening because by 4 November 1988 they were aware that the plaintiff were claiming title to the shares and yet HFRP did not intervene until 13 November 1989 and until after the court had upheld the plaintiff's preliminary objections. It was also contended for the plaintiff that by appealing against the decision on the preliminary objections, the defendants had elected on behalf of HFRP not to apply to add HFRP as a defendant. It was also submitted for the plaintiff that a mistake on the part of a lawyer was not a ground for exercising the court's discretion in allowing the intervener to be added as a party.

As regards the plaintiff's application for judgment, it was contended that, since the affidavit in support of the application had not been contradicted by the defendants, they were deemed to have admitted the contents of the affidavit. It was also contended for the plaintiff that it was a term of the judgment on the preliminary objection that the defendants and not HFRP must make the application for joinder of HFRP as a defendant or else the judgment which had been deferred will be entered.

Held, allowing HFRP's application and dismissing the plaintiff's application:

(1) The presence of HFRP before the court was necessary to ensure that the dispute as to the ownership of the shares could be effectually and completely determined and adjudicated upon. The dispute over the ownership of the shares was a question or an issue arising out of or relating to or connected with the relief or remedy claimed by the plaintiff. HFRP's rights will be directly affected by an order in this action.

(2) The facts deposed to in the affidavit objected to had already been set out in the earlier judgment and there was no need for an affidavit to repeat what had been said in the judgment nor is it desirable that an affidavit should contain submissions and contentions which are best left for counsel to address to the court.

(3) The defendants' action in filing an appeal against the decision that HFRP ought to be a party to the action and HFRP's action in applying to be joined as a defendant could not have induced

the plaintiff to believe that the one or the other course of action had been abandoned when such steps indicated that both were being pursued. There was therefore no question of election or estoppel.

(4) There was no time limit prescribed by the Rules of the High Court 1980 for an application to join in as a defendant. The application in the present case was made within four days after the court had ruled that HFRP was a necessary party. The delay in filing the application could not be considered inordinate as the issue of the ownership of the shares had not yet been tried.

(5) It followed from the ruling that HFRP be added as a defendant that judgment as prayed by the plaintiff could not be entered.

(6) The affidavit in support of the plaintiff's application contained only contentions and submissions which are not really the function of an affidavit. There was no allegation of fact in it which if unrefuted would entitle the plaintiff to judgment and consequently there was no such admission by default of an affidavit in reply.

(7) There was no term in the judgment that it must be the defendants who should apply to join HFRP as a defendant or that the defendants could not appeal against the ruling upholding the preliminary objections or else judgment will be entered against the defendants.

[Bahasa Malaysia summary

Plantif telah memulakan tindakan ini pada 21 Oktober 1988 untuk beberapa deklarasi tertentu, injunksi dan ganti rugi terhadap defendan berikutan dengan perlantikan seorang penerima bagi sebuah syarikat bernama Hiew Fook Realty (Holdings) Sdn Bhd oleh sebuah bank mengikut satu debentur yang diberikan kepadanya oleh syarikat itu. Penerima itu telah mengambil berbagai langkah yang berkesudahan dalam Borneo Hotel Sdn Bhd ('syarikat itu'), yang merupakan sebuah anak syarikat Hiew Fook Realty (Holdings) Sdn Bhd, membuat resolusi di satu mesyuarat agung luarbiasa untuk menjual Borneo Hotel yang merupakan satu aset syarikat itu. Antara relif yang dipohon di dalam tindakan ini adalah satu deklarasi bahawa mesyuarat syarikat itu adalah tidak sah, batal dan tak sah, dan tidak berkesan dan satu injunksi untuk menyekat jualan Borneo Hotel.

Apabila perbicaraan bermula, peguam bagi plaintif menimbulkan berbagai bantahan permulaan, mengatakan yang HFR Plantations Sdn Bhd ('HFRP') sepatutnya ditambah sebagai satu pihak. Plaintif telah memohon di dalam tindakan ini untuk mendirikan mereka sendiri sebagai tuan punya saham-saham syarikat itu. Isu yang timbul adalah sama ada plaintif atau HFRP yang merupakan tuan punya saham-saham itu.

Mahkamah telah menerima bantahan itu dan memerintahkan satu penangguhan perbicaraan itu supaya satu permohonan boleh dibuat untuk menambah HFRP sebagai satu defendan kepada tindakan ini.

A Dalam masa empat hari selepas mahkamah membuat perintah itu, HFRP telah memohon untuk satu perintah supaya dicantumkan sebagai satu defendan kepada tindakan itu. Permohonan itu telah ditentang oleh plaintif. Plaintif juga mengemukakan satu saman dalam kamar untuk penghakiman dicatitkan terhadap defendan.

B Juga dihujah bagi plaintif bahawa keterangan afidavit tertentu yang dikemukakan oleh defendan tidak boleh diterima kerana punca keterangan dan alasan bagi kepercayaan deponen tidak dinyatakan. Nampaknya, deponen telah menyatakan apa yang dipercayainya berasaskan apa yang telah diberitahunya oleh peguam defendan. Fakta yang didepos di dalam afidavit dan yang ditentang oleh peguam C plaintif telah dibentangkan dengan lengkap di dalam penghakiman mahkamah ketika prosiding yang lebih awal di dalam tindakan ini.

Juga telah dihujah bagi plaintif bahawa terdapat kelengahan pada belah HFRP dan bahawa HFRP diestop daripada mencelah kerana menjelang 4 November 1988 mereka mengetahui bahawa plaintif telah menuntut hakmilik saham-saham itu tetapi namun demikian, D HFRP tidak mencelah sehingga 13 November 1989 dan sehingga selepas mahkamah telah menerima bantahan permulaan plaintif. Juga dihujah bagi plaintif bahawa dengan merayu terhadap keputusan tentang bantahan permulaan itu, defendan telah membuat perlantikan bagi pihak HFRP supaya tidak memohon untuk menambah HFRP E sebagai satu defendan. Juga dihujah bagi plaintif bahawa satu kesalahan (mistake) pada belah peguam bukanlah satu alasan untuk mahkamah menggunakan budi bicara bagi membenarkan pencelah ditambah sebagai satu pihak.

Berkenaan permohonan plaintif bagi penghakiman, telah dihujah bahawa oleh kerana afidavit yang menyokong permohonan itu tidak F disangkal oleh defendan, mereka dianggap sebagai mengakui kandungan afidavit itu. Juga dihujah bagi plaintif bahawa adalah menjadi satu terma penghakiman atas bantahan permulaan itu bahawa defendan dan bukan HFRP yang patut membuat permohonan untuk percantuman HFRP sebagai satu defendan, kalau tidak penghakiman yang G telah ditangguh akan dicatitkan.

Diputuskan, membenarkan permohonan HFRP dan menolak permohonan plaintif itu:

(1) Kehadiran HFRP di hadapan mahkamah adalah perlu untuk menentukan bahawa pertelingkahan tentang hakmilik saham- H saham itu boleh ditentukan dan dipertimbangkan secara berkesan dan lengkap. Pertelingkahan tentang hakmilik saham-saham itu adalah satu soalan atau isu yang berbangkit daripada atau berkenaan dengan atau bersangkutan dengan relif atau remedi yang dituntut oleh plaintif. Hak-hak HFRP akan terjejas secara langsung I oleh satu perintah di dalam tindakan ini.

(2) Fakta-fakta yang didepos di dalam afidavit yang ditentang itu telah dibentangkan di dalam penghakiman yang lebih awal dan tidaklah perlu bagi afidavit itu mengulang apa yang telah dinyatakan di dalam penghakiman itu. Begitu juga tidaklah diingini bahawa

satu afidavit mengandungi hujah dan dakwaan yang paling baik ditinggalkan kepada penguambela untuk dikemukakan di mahkamah.

(3) Tindakan defendan dalam memfailkan satu rayuan terhadap keputusan bahawa HFRP patut menjadi satu pihak kepada tindakan ini dan tindakan HFRP dalam membuat permohonan untuk dicantumkan sebagai satu defendan tidak mungkin mendorong plaintif untuk mempercayai bahawa tindakan itu atau yang satu lagi telah ditinggalkan walhal langkah-langkah itu menunjukkan bahawa kedua-keduanya masih dituntut. Oleh itu tidak ada soalan tentang perlantikan atau estopel.

(4) Tidak ada had masa yang diperuntukkan oleh Kaedah-Kaedah Mahkamah Tinggi 1980 untuk satu permohonan supaya dicantumkan sebagai satu defendan. Permohonan dalam kes ini telah dibuat dalam masa empat hari selepas mahkamah memutuskan bahawa HFRP adalah satu pihak yang diperlukan. Kelengahan dalam memfailkan permohonan itu tidak boleh disifatkan sebagai tidak berpatutan kerana isu hakmilik saham-saham itu masih belum dibicarakan.

(5) Mengikut keputusan bahawa HFRP ditambah sebagai satu defendan, maka penghakiman seperti yang dipohon oleh plaintif tidak boleh dicatitkan.

(6) Afidavit yang menyokong permohonan plaintif mengandungi cuma dakwaan dan hujah yang bukan sebenarnya fungsi suatu afidavit. Tidak ada apa-apa pengataan fakta di dalamnya yang jika tidak disangkal akan memberi plaintif hak kepada penghakiman dan lantaran itu tidak ada pengakuan sedemikian akibat keingkaran membuat satu afidavit balas.

(7) Tidak ada terma di dalam penghakiman itu bahawa defendanlah yang mesti memohon untuk mencantumkan HFRP sebagai satu defendan atau bahawa defendan tidak boleh merayu terhadap keputusan menerima bantahan permulaan itu, kalau tidak penghakiman akan dicatitkan terhadap defendan.]

Cases referred to

1 *Hee Awa & Ors v Syed Muhammad Sazalay bin Syed Ali Wara & Anor* [1988] 1 MLJ 300 (folld)
2 *Pegang Mining Co Ltd v Chong Sum & Ors* [1969] 2 MLJ 52 (folld)
3 *SP Sivagami Achi v Sohan Singh* [1959] MLJ 20 (refd)
4 *Cartwith Ltd v Lloyd, JE & Ors* [1965] 1 MLJ 140 (refd)
5 *Hari Singh v Sundarammal* [1965] 2 MLJ 174 (refd)
6 *Walter Knott v Chew Swee Loon Industries Sdn Bhd* [1983] 2 CLJ 39 (refd)
7 *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 (refd)
8 *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222 (refd)
9 *Tan Kiaw v Gan Chye Khoon* [1983] 2 MLJ 109 (distd)
10 *Meriam bte Yaacob & Ors v Shell Malaysia Trading Sdn Bhd* [1984] 2 MLJ 31 (distd)

A 11 *Nan Ofori Atta II v Nana Abdu Bonsra II* [1975] 3 All ER 559 (distd)
12 *Meng Leong Development v Jip Hong Trading* [1985] 1 MLJ 7 (distd)
13 *Edwards v Cowan* [1986] LRC (Com) 257 (distd)
B 14 *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111 (distd)
15 *Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118 (distd)
16 *Overseas Investment Pte Ltd v O'Brien, Anthony William & Anor* [1988] 3 MLJ 332 (refd)
C 17 *Amalgamated Steel Mills Bhd v Ingeback (M) Sdn Bhd* [1990] 2 MLJ 374 (refd)
18 *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 (refd)

D **Legislation referred to**
Rules of the High Court 1980 O 15 r 6(2)(b)

RR Sethu and *Peter Soong* (*Lawrence Chai & Peter Soong*) for the plaintiff.
WSW Davidson and *Norbert Yapp* (*Jayasuriya Kah & Co*) for the defendants and intervener.

E *Cur Adv Vult*

Ian HC Chin JC:

F I *History of case*

The history of this case and that of an originating proceedings (Originating Summons No 133 of 1987) has to be related in some detail in order to understand the matters which call for decisions. The parties are agreed that for the purposes herein references can be made to the documents in a record of appeal which were filed on 23 December 1989 by counsel for the G defendants in relation to an appeal to the Supreme Court. I will first advert to the said Originating Summons No 133 of 1987.

A Originating Summons No 133 of 1987

H Pursuant to a debenture issued by Hiew Fook Realty (Holdings) Sdn Bhd to a bank the first defendant was appointed receiver and he thereafter obtained from the court an order dated 14 March 1988 which, inter alia, permitted the first defendant to hold an extraordinary general meeting of a company called the Borneo Hotel Sdn Bhd ('the said company') which was referred to in the said court order as a subsidiary of Hiew Fook Realty I (Holdings) Sdn Bhd. Pursuant to and on the same day of the said order (14 March 1988) the first defendant caused an extraordinary general meeting ('EGM') of the said company to be held and caused the then directors to be removed and replaced by the first, second and third defendants. The said company thereafter resolved to sell Borneo Hotel, an asset of the said

company and appointed the fourth defendant to conduct the sale. As a result of the said removal and appointment of directors and the proposed sale of the said hotel, the plaintiff launched the action herein for which reference will now be made.

B The present action

(a) Writ and statement of claim. On 21 October 1988 the plaintiff took out a writ against the defendants for:

(1) a declaration that the EGM of the said company is invalid, null and void and of no effect;
(2) a declaration that the appointment of the first, second and third defendants as company directors of the said company is invalid, null and void and of no effect;
(3) a declaration that Datuk Hiew Min Yong, Hiew Min Han and Hiew Min Hoi are and continue to be the lawful company directors of the said company;
(4) an injunction to restrain the first, second and third defendants by themselves or by their servants or agents or otherwise from acting or continue to act in any manner and howsoever as company directors of the said company;
(5) an injunction to restrain the fourth defendant by themselves or by their servants or agents or otherwise from taking instructions from the first, second and third defendants as company directors of the said company on all matters whatsoever and restrain them from selling by tender or otherwise or deal with in any manner the property of the said company known as the Borneo Hotel erected on Kota Kinabalu Town Lease No 015106251; and
(6) damages.

The statement of claim alleges that the plaintiff is at all relevant times the registered owner of the total paid-up shares (hereinafter referred to as 'the said shares') of the said company which said company the first defendant 'wrongfully and negligently' alleged to be a subsidiary of Hiew Fook Realty (Holdings) Sdn Bhd which resulted in the High Court in Borneo in Originating Summons No 133 of 1987 making an order empowering the first defendant to hold the EGM of the said company and the removal of the then directors and the replacement thereof by the first, second and third defendants. The said defendants, the plaintiff alleges, after becoming directors of the said company then resolved to sell Borneo Hotel which is an asset of the said company and the sale was to be conducted by the fourth defendant.

(b) Defence. The defendants by their joint defence allege that the said shares had at all times been and still are registered in the name of HFR Plantations Sdn Bhd ('HFRP') and denied that the said shares had ever been transferred to the plaintiff. The defendants further allege that, if there was a transfer from HFRP to the plaintiff, the transfer 'was made with the

intention of defrauding the creditors of Hiew Fook Realty (Holdings) Sdn Bhd', the holding company of HFRP and ultimate holding company of the said company. The defendants also allege that the plaintiff is estopped from challenging the order made in Originating Summons No 133 of 1987 'in that at the hearing of the said application the plaintiff was present through counsel, never challenged the first defendant's assertion that' the said company was a subsidiary of Hiew Fook Realty (Holdings) Sdn Bhd and did not oppose the granting of the said order.

(c) Interlocutory injunction. On 27 October 1988 the plaintiff obtained an ex parte injunction more or less in terms of the prayers. On 9 November 1988 the injunction was varied and an early trial was ordered.

II *The hearing of the action*

When the case came on for hearing on 7 November 1989 plaintiff's counsel raised various 'preliminary objections'. Counsel for the plaintiff contended that 'none of the defences raised in the statement of defence are open to any of these defendants'. He concluded his address by saying that HFRP 'should have been brought in as a party'. The court on 9 November 1989 ruled that the 'the preliminary objection is sustained' following which counsel for the plaintiff submitted that 'the whole defence will have to be struck off and prayers sought in the statement of claim to be made'. To that counsel for the defendants replied that an amendment could be made. The court then ruled: 'In the interests of justice, this hearing is adjourned to a date to be fixed to enable necessary application to be made to add HFP as defendant". 'HFP' there refers to HFR Plantations Sdn Bhd which in this ruling is referred to as 'HFRP'.

III *Appeal to Supreme Court*

The defendants appealed against the said decision that sustained the 'preliminary objections' but the hearing in the Supreme Court was adjourned. I have asked counsel of both parties but they are unable to produce to me a copy of the notes of proceedings of the Supreme Court.

IV *Present applications*

(a) By HFRP for joinder

HFRP took out a summons-in-chambers on 13 November 1989 and applied to be added as the fifth defendant in the present action. The application is supported by three affidavits, one sworn by the first defendant on 13 November 1989 and two sworn by the second defendant respectively on 16 August 1990 and 26 June 1992. It is opposed by the plaintiff through an affidavit of its director, one Susan Elizabeth Beach, affirmed on 14 August 1990. This application was heard on 30 June 1992 and 1 July 1992. For brevity this application will be hereinafter referred to as 'the HFRP application'.

(b) By plaintiff for judgment

The plaintiff on 1 December 1989 took out a summons-in-chambers for judgment to be entered against the defendants. This application is supported by an affidavit affirmed by the said Susan Elizabeth Beach on 25 November 1989. This application ('the plaintiff's application') was, together with the application by HFRP, heard by me on 30 June 1992 and 1 July 1992 and was adjourned to today for ruling.

These are the two matters which call for decisions.

V *Decisions*

(a) The HFRP application for joinder

(1) Whether proposed joinder within O 15 r 6(2)(b)(i) and (ii)

I propose to first deal with the HFRP application for joinder as a defendant. This calls for consideration of the provisions of O 15 r 6(2)(b)(i) and (ii) of the Rules of the High Court 1980 which is — what is the 'matter in dispute in the cause or matter' or what is the 'question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter'. As this point was canvassed by the plaintiff before the court at the trial of the 'preliminary objections' on 7 and 9 November 1989, which is that this is a case suitable for joinder, the following maxim of law applies — *Allegans contraria non est audiendus* — 'He is not to be heard who alleges things contradictory to each other'. See *Broom's Legal Maxims* (1st Ed) at p 103 where it is stated thus:

> This elementary rule of logic, which is frequently applied in our courts of justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.

The notes of proceedings, the oral judgment and the grounds of decision of the said trial (see pp 7–11, 14–21 and 41–51 of the record of appeal) contain the following statements or arguments advanced by counsel on behalf of the plaintiff at the said trial, viz:

(1) '"HRP" owns the shares of Borneo Hotel. Therefore, HRP is the proper person to complain' (see p 43 of the record of appeal);
(2) 'HFP should have been brought in as a party' (see p 49 of the record of appeal);
(3) 'HFP should have applied to intervene because HFP was aware of this proceedings and HFP had not done so. HFP was all aware that the validity of the shares is being disputed' (p 50 of the record of appeal).

The abbreviations 'HRP' and 'HFP' in the extracts refer to the intended intervener HFRP.

The above extracts show that the plaintiff had through his counsel in an earlier proceeding in this action and relating to the issue of the party necessary for the action, maintained that HFRP is a proper party for this

action. Consequent upon the argument advanced by counsel for the plaintiff the court had at the said trial ruled that the defendants cannot challenge the transfer of the shares to the plaintiff and that only HFRP can do so and HFRP should have been brought in as a party. The plaintiff cannot, on the authority of the said legal maxim, now contend that HFRP is not a proper party when it had in the said earlier proceedings maintained that HFRP is a proper party.

If I am wrong and the plaintiff can still be heard to argue that HFRP is not a proper party, I would for the reasons appearing herein below still allow the application by HFRP. It cannot be argued otherwise than that the central issue in this action is the ownership of the shares in the said company. Every relief and remedy sought by the plaintiff in this action hinges upon the plaintiff being able to establish that they are the owners of the shares of the said company. The validity of the first, second and third defendants' appointment as directors and their purported acts as such directors of the said company, which the plaintiff claims are wrongful, also hinges on their being able to establish that HFRP and not the plaintiff is the owner of the shares in the said company. The issue or question is therefore — who is really the owner of the said shares, the plaintiff or HFRP. Any decision in this case regarding the ownership of the said shares would surely affect the legal rights of HFRP. I am of the opinion, and in so doing I agree with the submission of counsel for the defendants and HFRP, not only that the presence of HFRP before the court is necessary to ensure that the dispute as to the ownership of the said shares can be effectually and completely determined and adjudicated upon but also that the dispute of the ownership of the said shares is a question or an issue arising out of or relating to or connected with the relief or remedy claimed by the plaintiff. Counsel for both parties have referred to numerous authorities for which I need only refer to the case of *Hee Awa & Ors v Syed Muhammad Sazalay bin Syed Ali Wara & Anor*[1] which accepted the test laid down by the case of *Pegang Mining Co Ltd v Chong Sum & Ors*[2] which is that in determining whether a person ought to be added as a party to the action the test is — 'will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an order which may be made in the action?'. The grant of the declarations and injunctions prayed for by the plaintiff in this action would result in HFRP losing its rights to or its rights to claim the said shares. I therefore have no doubt, applying the said test, that HFRP's rights against the plaintiff will be directly affected by an order in this action.

Counsel for the plaintiff had advanced other reasons why the court should not exercise its discretion to allow HFRP to be added as a defendant and to them I will now advert one by one.

(2) No admissible affidavit evidence

The plaintiff contends that the affidavit of the first defendant, sworn to on 13 November 1989, cannot be admitted as evidence because the source of the information and the grounds of belief are not stated and there is therefore no material before the court upon which the court is to exercise

its discretion. In support thereof the cases of *SP Sivagami Achi v Sohan Singh*;[3] *Cartwith Ltd v Lloyd, JE & Ors*;[4] *Hari Singh v Sundarammal*;[5] and *Walter Knott v Chew Swee Loon Industries Sdn Bhd*[6] were cited together with a reference to *Mallal's Supreme Court Practice* at p 477. Counsel for the defendants and HFRP replied that the reason for the joinder of the intended intervener emerged from the judgment of the learned judge of the trial of the 'preliminary objections' and from the said affidavits of Kevin How Kow. He gave a statement from the Bar that the advice which the first defendant deponent believed came from him. The facts have already been fully set out in the said judgment and I agree that there is no need for an affidavit to repeat what has been set out in the said judgment nor is it desirable that the affidavit should contain submissions and contentions which are best left for counsel to address the court. See *Alfred Dunhill Ltd v Sunoptic SA*[7] and *Re Application by Dow Jones (Asia) Inc*[8] at p 225. There is sufficient material before the court, as can be gleaned from the record of appeal (which includes the judgment of the learned judge in respect of the 'preliminary objections' and several affidavits) and the said affidavits of Kevin How Kow, to enable the court to decide whether to exercise its discretion.

(3) Delay, estoppel and election

It is also contended by the plaintiff that there has been delay on the part of HFRP and that HFRP is estopped from intervening because HFRP were by 4 November 1988 aware that the plaintiff were asserting title to the said shares and yet HFRP sat back and did not intervene until 13 November 1989 and until after the court had upheld the said 'preliminary objections'. The cases cited in support of this proposition by counsel for the plaintiff were *Tan Kiaw v Gan Chye Khoon*[9] at p 113; *Meriam bte Yaacob & Ors v Shell Malaysia Trading Sdn Bhd*;[10] and *Nana Ofori Atta II v Nana Abu Bonsra II*[11] at pp 561–562. All those cases can be distinguished. In the present case, the issue of the ownership of the shares has not been litigated yet and it cannot be litigated until HFRP is added as a party and the proceedings already had (ie the hearing and the decision on the 'preliminary objections' merely decides that the issue of the share ownership cannot be raised by the present defendants, and did not decide who owns the shares and HFRP wants to join in to have the issue of the ownership of the shares resolved. In *Tan Kiaw*[9] the issue was the entitlement to the possession of a premises which a court had already adjudicated on and the intended intervener was aware of proceedings relating thereto but yet did nothing until the application for leave to issue a writ of possession was applied for. Similarly the other two cases *Meriam bte Yaacob*[10] and *Nana Ofori Atta II*,[11] can be distinguished — there the right of the intended intervener had already been adjudicated, which is not so in the present case. It was also contended by the plaintiff that the defendants by appealing against the order of the court (which upheld the 'preliminary objections' and which ruled that HFRP is a proper party) elected on behalf of HFRP not to apply to add HFRP as a defendant and the cases of *Meng Leong Development v Jip Hong Trading*[12] at pp 11–13 and *Edwards v Cowan*[13] at

pp 258, 362 and 363 were cited in support which are cases where a party cannot take both damages and specific performance as they are mutually exclusive. In the present case the defendants had appealed against the ruling that they on their own cannot raise the defence that the plaintiff are not the owners of the said shares while HFRP applied to be joined as a defendant, both courses of which are not mutually exclusive because irrespective of whether the defendants succeed in their appeal, HFRP still has a right conferred by O 15 r 6(2)(b)(i) and (ii) of the Rules of the High Court 1980 to apply to be joined. The action of filing the said appeal and of filing this application to be added as a party both at the same time on 13 November 1989 could not have induced the plaintiff to believe that the one or the other course of action had been abandoned when such steps indicated that both are being pursued. There is therefore no question of election or estoppel.

(4) Counsel for the plaintiff also submitted that mistake on the part of the lawyer is not a ground for exercising the court's discretion in allowing the intervener to be added as a party and in support were cited *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors*[14] at p 116; and *Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor.*[15] Those are cases dealing with enlargement of time where time has been specifically provided for the doing of an act under the Rules of the High Court 1980. In the present case, no time limit has been set by the Rules of the High Court 1980 for the making of an application to join in as a defendant and the application in the present case was made within four days after the court has ruled that HFRP was a necessary party. It cannot be argued that this is inordinate delay, which I am inclined to believe may disallow an application of this nature though the rule sets no time limit. Even assuming that HFRP could have intervened as soon as the writ was issued against the defendants on 21 October 1988, the delay in filing the application only on 13 November 1989 cannot be considered inordinate as the issue of the ownership of the said shares has not yet been tried.

As none of the objections can be sustained, I therefore grant the application of HFRP to be added as the fifth defendant and I further order that the fifth defendant shall within 14 days hereof take out a notice under summons for directions setting out the various amendments the fifth defendant sought to make to the pleadings concerned as a result of being added as a fifth defendant and the summons for directions shall be restored for hearing in order to enable the said notice under summons for directions to be dealt with. I will hear the parties as to costs at another date.

(b) Plaintiff's application for judgment

It should follow from my ruling that HFRP be added as a fifth defendant that judgment, as prayed for in the plaintiff's application, cannot be entered for the plaintiff against the defendants as the adding of the fifth defendant has provided the answer to the 'preliminary objections' and this appears to be what the court had in mind when the court on 9 November 1989, after upholding the preliminary objections, made the following ruling — 'In the

interests of justice, this hearing is adjourned to a date to be fixed to enable necessary application to be made to add HFP as defendant'. It would be an exercise in absurdity to allow the application by HFRP for joinder and yet allow the application by the plaintiff for judgment. Nevertheless I will still advert to the submissions of counsel for the plaintiff for judgment to be entered in case I am wrong in what I have just stated.

The plaintiff contends that the reason for which the honourable judge deferred judgment, which is that the defendants be allowed to apply to add HFRP as a defendant, no longer exist because the defendants did not apply to add HFRP as a defendant even though HFRP did. The plaintiff contends that since the affidavit of its director, Susan Elizabeth Beach affirmed on 25 November 1989, in support of the application for judgment, had not been contradicted it should be deemed admitted by the defendants. It is therefore necessary to reproduce the relevant parts of the said affidavit to see what it says, viz:

3 I crave leave to refer to the proceedings in this matter and in particular to the hearing on 7 November 1989 and 9 November 1989. I was present in court throughout the hearing on those dates.

4 Counsel representing the plaintiff company raised preliminary objections as to the locus standi of the defendants to raise and maintain their pleaded defences.

5 This honourable court on 9 November 1989 upheld the preliminary objections.

6 Though the plaintiff had requested that judgment be entered for the plaintiff pursuant to that ruling, the defendants indicated that they wanted to bring in HFR Plantations Sdn Bhd as a party in these proceedings because, the defendants argued, that the misjoinder or non-joinder would not defeat the rights of parties.

7 After hearing submission from both sides this honourable court 'in the interests of justice' adjourned these proceedings to a date to be fixed to enable a written application to be filed for the joinder of HFR Plantations Sdn Bhd.

8 I am advised by the plaintiff's solicitors and verily believe, that the defendants, by making the oral application for the joinder of HFR Plantations Sdn Bhd, accepted the ruling of the honourable court on the preliminary objections.

9 I believe that the reason why this honourable court did not then enter judgment on the claim for the plaintiff was to keep the present proceedings alive so that this honourable court can dispose of the intended (or threatened) written application for the joinder of HFR Plantations Sdn Bhd. If judgment had then been entered for the plaintiff the application for the joinder of HFR Plantations Sdn Bhd cannot be entertained.

10 The plaintiff's solicitors informed me that they had on 17 November 1989 received a copy of the defendants' notice of appeal dated 9 November 1989 against the ruling of this honourable court. The plaintiff does not admit the validity or the competence of the appeal as at present advised.

11 The reason for the postponement of the entry of the judgment has ceased to exist. I am advised by my solicitors that the filing of the appeal is inconsistent with the application for the joinder of HFR Plantations Sdn Bhd.

It cannot be disputed that the cases of *Overseas Investment Pte Ltd v O'Brien, Anthony William & Anor*[16] and *Amalgamated Steel Mills Bhd v Ingeback (M)*

Sdn Bhd[17] support the proposition that an allegation of fact on oath (by affidavit) when not denied or contradicted is deemed to be admitted. But the affidavit just quoted in so far as they matter contain only contentions and submissions which are really not the function of an affidavit. The affidavit makes submissions and contentions with regard to the meaning of a judgment and by quoting the judgment in part in the affidavit without even exhibiting the notes of proceedings and the judgment. It would be a pointless exercise for an affidavit in reply which will, given the circumstance, surely merely contain differing submissions and contentions which are best left to counsel to address the court. See *Alfred Dunhill Ltd v Sunoptic SA*[7] and *Re Application by Dow Jones (Asia) Inc*[8] at p 225. There is no allegation of fact in the said affidavit which if unrefuted would entitle the plaintiff to judgment and consequently there is no such admission by default of an affidavit in reply.

The next contention of the plaintiff presupposes that a term exist in the said judgment that the defendants and not HFRP must make the application to be joined as a defendant or else the judgment which has been deferred will be entered. In order to make this ruling intelligible I think it best to reproduce the relevant parts of the notes of proceedings and judgment, viz:

From the judgment:

> 5 In the final analysis, I conclude that the said defendants are incompetent to challenge the validity of the alleged transfer as raised in their defence, ie they do not have the locus standi to maintain their defence in its present form ... HFP should have been brought in as a party. ['HFP' there refers to HFRP.]
> ...
> 7 Thereafter, its preliminary objection is sustained.

From the notes of proceedings:

> Mr Sethu says that in the light of the ruling the whole defence will have to be struck off and prayers sought in the statement of claim to be made ...
>
> Mr Davidson says finally: ... Urge court to allow application to add HFP as defendant.
>
> Court: In the interests of justice, this hearing is adjourned to a date to be fixed to enable necessary application to be made to add HFP as defendant. ['HFP' there refers to HFRP.]

Thus, as can be gathered from the notes of proceedings and the judgment, it is never a term of the judgment that it must be the defendants who should make the application to join HFRP as a defendant and not the said HFRP itself. There is therefore no basis for the contention that judgment should be entered because the defendants did not apply to join HFRP even though HFRP had applied. Neither is there any term in the judgment that the defendants cannot appeal against the ruling upholding the preliminary objections or else judgment will be entered against the defendants.

Counsel for the defendants had also argued that judgment cannot be entered as it amounts to obtaining declarations by default. Numerous authorities were cited and I do not propose to go through all of them and it suffices to refer only to the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*[18] because, as Edgar Joseph Jr SCJ, in that

case at p 722 said, nowadays the courts recognize the advantages of the declaration, and therefore pay little attention to the early cases. Following the decision of that case I surmise the law regarding declarations to be that the court should not be slave to expositions of general statement of principles or rules regarding the court's reluctance to grant declarations because what was viewed as proper years ago may not now be so and neither should general principles be laid down as binding in advance given the myriad circumstances which the court will meet from time to time in the future as this may, when it should not, vitiate the discretion which the court has in making declarations. In the *Dewan Undangan Negeri Kelantan* case,[18] the court, in the exceptional circumstances of that case, held that it was in order for the learned trial judge to make declarations in the absence of two persons who were directly affected by the declarations because the two persons had stood by and let the Kelantan State Assembly fight the issue of the validity of a law, which affected the said two persons, on their behalf. Counsel for the plaintiff argued that similarly, HFRP in this case stood by while the defendants fought the suit on their behalf. I do not agree. What was fought was whether the defendants on their own can raise the defence that the ownership of the said shares lies not with the plaintiff but with HFRP. The actual issue of the ownership of the said shares has not yet been litigated and it is this litigation that HFRP wanted a part. This is different from the case just cited in that there the validity of the law which affects all actions flowing thereunder had already been adjudicated and the two persons should have intervened before the adjudication on the validity of the law.

I therefore dismiss the plaintiff's application for judgment. The court will fix another date for hearing argument as to the award of costs. The two summons-in-chambers are adjourned to a date to be fixed by the senior assistant registrar for the said purpose of the hearing of argument regarding the award of costs.

Order accordingly.

Reported by PS Ranjan